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No. 80-5889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,

Petitioners,

vs.

BERNHARDT S. KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Section 622 of the New York Family Court Act is unconstitutional because it permits the Family Court to terminate parental rights based upon a "fair preponderance of the evidence."

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Family Court, Ulster County is unreported. The opinion of the Appellate Division, Third Department is reported at 76 A.D.2d 837, 427 N.Y.S.2d 319. No other opinions have been rendered.

JURISDICTION

Petitioner's appeal to the New York Court of Appeals was dismissed on September 16, 1980. Their petition for a writ of certiorari was filed in this Court on December 13, 1980. The petition was granted by this Court on March 23, 1981. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law, . . .

The statutes which this case involves are New York Family Court Act §§611, 614, 622-626, 631-634 and New York Social Services Law §384-b. These are set forth in full in Appendix A, *infra.*

STATEMENT OF THE CASE

Petitioners John Santosky II and Annie Santosky (also referred to as "the father" and "the mother" respectively) are the parents of five children, three of whom are the subjects of these proceedings. On April 10, 1979, the Ulster County, New York Family Court issued orders permanently terminating petitioners' parental rights with respect to Tina Frances Apel, born on April 15, 1971, John Santosky III, born on August 22, 1973, and Jed Santosky, born on August 19, 1974. [J.A. 41-46]

Tina Apel was removed from petitioners' home by respondent Bernhardt S. Kramer and the Ulster County Department of Social Services (the Department is also referred to hereinafter as respondent) and has been in a foster home since November 20, 1973. [J.A. 19] John Santosky III was removed from petitioners' home by respondent on August 19, 1974. [J.A. 5] On the same day the mother gave birth to her third child, Jed Santosky. On August 22, 1974, when he was three days old and still in the hospital maternity ward, respondent took temporary custody of Jed. [J.A. 6] Each of the children were adjudicated neglected children within the meaning of Article 10 of New York's Family Court Act and placed with respondent for an initial period of eighteen months. [J.A. 19-20] At the expiration of their respective periods of placement, extensions of placement were duly ordered by the Family Court. *Id.*

On September 8, 1976, respondent made his first attempt to terminate petitioners' parental rights to these children by filing petitions under Article 6 of the New York Family Court Act.[1] (*Matter of Santosky*, 89 Misc.2d 730, 393 N.Y.S.2d 486 (Fam. Ct. Ulster Cty. 1977)). Respondent sought to terminate petitioners' parental rights at that time on the theory that petitioners had failed "to plan for the future of their children" as prescribed by section 614, subd. 1(d) of the Family Court Act (hereinafter referred to as Fam. Ct. Act).[2] *Matter of Santosky*, 89 Misc.2d at 732-733, 393 N.Y.S.2d at 488.

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[1]New York separates the neglect and permanent neglect proceeding. In a number of states, however, permanent termination of all parental rights may be ordered at the initial neglect proceeding. *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1316 n.47 (1980).

[2]Termination of parental rights in New York serves the principle purpose of eliminating the requirement that the parent consent to the

(continued)

After conducting a hearing on the matter, the Family Court, Ulster County (Elwyn, J.) dismissed the petition, having found by a preponderance of the evidence that there was insufficient ground to sustain the petition to terminate petitioner's parental rights. *See Matter of Santosky, supra.* [J.A. 19] Although the Family Court regarded the question of the adequacy of the parents' plan to be close, the court was "willing to give the [petitioners] the benefit of the doubt." 89 Misc.2d at 740, 393 N.Y.S.2d at 493. Respondent pursued his attempt to terminate parental rights by appealing to the Supreme Court, Appellate Division. On appeal, that court affirmed. *Matter of John W.*, 63 A.D.2d 750, 404 N.Y.S.2d 717 (Third Dept. 1978). In affirming the Third Department specifically held:

> The Family Court found that respondents had made a good faith effort to cooperate with the agency in its plans for the children's future; that such cooperation, together with a move to more spacious living quarters and the

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(footnote continued from preceding page)

adoption of his or her child in a subsequent proceeding. Termination results in an order committing the guardianship and custody of the child to a non-parent, usually a local commissioner of social services. Commitment of guardianship and custody can be accomplished by four routes: voluntary permanent surrender pursuant to New York Social Services Law § 384 (hereinafter Soc. Serv. L.); when both parents are dead and no guardian has been lawfully appointed, Soc. Serv. L. § 384b(4)(a); when the parents have abandoned the child for six months immediately prior to the initiation of the proceeding, Soc. Serv. L. § 384b(4)(b); when both parents are unable to care for their children by reason of mental illness or mental retardation, Soc. Serv. L. § 384b(4)(c); and when the child is "permanently neglected," Soc. Serv. L. § 384b(4)(d). This case only concerns the last category—permanent neglect. In these proceedings, although the parent has not "abandoned" the child, termination of parental rights is sought because of the length of time the child has spent in foster care and because of a belief that it is unlikely the child will be returned home in the foreseeable future.

> father's improvement of his job skills, constituted planning by conduct; and that respondents acted to accomplish the agency's plan. In our view, these findings are sufficiently supported in the record. Considering the record as a whole, we are of the opinion that respondents have substantially planned for the future of the children. . .

63 A.D.2d at 751, 404 N.Y.S.2d at 719.

Since the time respondent took custody of petitioners' three children, petitioners have had two other children, James, who was born in January, 1976, and Jeremy, who was born in late summer, 1978. [T 393]* Both of these children are being cared for by petitioners at this time and no report of suspected abuse or neglect as to these children has ever been made. [T. 393, 397-390]

On October 16, 1978, respondent filed a second set of petitions to terminate permanently petitioners' parental rights with respect to Tina, John III and Jed on the ground that the children were permanently neglected as defined by section 384-b(7) of the New York Social Services Law.[3] [J.A. 2-7] Those petitions commenced the proceedings

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*[T.] refers to the page number of the transcript of the hearings held in the Ulster County Family Court on January 23, 26, 31 and February 1, 1979.

[3]A permanently neglected child is defined by section 384-b(7)(a) of the New York Social Service Law as

> a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

The relevant New York statutes are set forth in full in Appendix A, *infra*.

which brought the case ultimately to this Court. At the time the second set of petitions to terminate parental rights were filed, the placement of the children in respondent's custody had been twice extended by the Family Court. [J.A. 19-20] The petitions alleged that respondent (petitioner in the Family Court):

> has made diligent efforts to encourage and strengthen the parental relationship in that
>
> (a) The petitioner arranged to bring the children to the Santosky's for visits with the respondents on an average of twice a month.
>
> (b) The petitioner encouraged the respondent, Annie Santosky to attend the Child Enrichment Program offered by Family Service Center to mothers with pre-school children, and which program included the use of a parent aid. Transportation to the program was also offered.
>
> (c) The petitioner arranged for and paid for psychological evaluations of both respondents, and a complete neurological evaluation of respondent, John Santosky, at St. Frances Clinic, Poughkeepsie. Transportation was also provided.
>
> (d) The petitioner offered follow-up psychiatric and psychological services to both respondents at Southern Ulster Mental Health Center.
>
> (e) The petitioner arranged for counselling sessions for respondents with Elizabeth Smith of Family Service Center.
>
> (f) The petitioner offered birth control counselling at Planned Parenthood.
>
> (g) The petitioner offered vocational training to the Respondent, John Santosky at the Adult Learning Center.
>
> (h) The petitioner offered educational assistance to Respondent, John Santosky at the Adult Learning Center.

(i) The petitioner has provided nutrition aid services to respondent Annie Santosky since November 1977.

(j) The petitioner offered Homemaker Service to help the respondents immediately prior to and after the birth of the recent infant in June, 1978.

(k) The petitioner has provided Public Assistance, Food Stamps and Medicaid to the respondents. The total value of all services offered to the respondents since November 1976 exceeds $16,000.

[Petition, ¶6; J.A. 3, 6-7]

In addition, the petitions, tracking the language contained in Fam. Ct. Act §614, alleged that:

(N)otwithstanding such efforts:, the (parent(s)) (have) failed for a period of more than one year following the date the children came into the care of Petitioner, an authorized agency, substantially and continuously or repeatedly to maintain contact with or plan for the future of each child although physically and financially able to do so.

[Petition, ¶7; J.A. 3]

Finally, the petitions alleged that:

The best interests of said child require the commitment of the guardianship and custody of each child to Petitioner, (an authorized agency) for the following reasons:

1. Respondents cannot or will not provide a normal family home for the children.

2. Each of the children has been in foster care for a continuous period in excess of four years and continued foster care is not an appropriate plan.

3. Professional psychiatric consultants have evaluated the children and have advised that a permanent alternative home should be sought for the children.

[Petition, ¶8; J.A. 3, 7]

A fact-finding hearing was held before Judge Elwyn in the Family Court, Ulster County on January 23, 26, 31 and February 1, 1979.[4] At the commencement of the fact-finding hearing, counsel for petitioners challenged the constitutionality of Fam. Ct. Act §622 was unconstitutional because it authorized termination of parental rights upon proof supported only by a "preponderance" of the evidence. He asserted that the Due Process clause of the Constitution required a higher standard; namely, proof sustained by "clear and convincing" evidence. [T. 8-9]

To sustain his petition, respondent had to prove four separate points at the fact-finding stage: a) that the children were under the age of eighteen years, b) that the children were in the care of an authorized agency, c) that respondent had "made diligent efforts to encourage and strengthen the parental relationship" and d) that petitioners, notwithstanding respondent's efforts, had "failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." [Fam. Ct. Act § §614 and 622]

There was no dispute respecting the age of the children or the length of time they were in respondent's care. Accordingly, the thrust of respondent's case was to document their own "diligent efforts" and the failure of petitioners to maintain contact or plan for the future of their children.

[4]In New York, the permanent neglect proceeding is bifurcated into a fact-finding and dispositional phase. A fact-finding is defined by the New York statute as "a hearing to determine whether the allegations required by paragraphs (a) (b) (c) and (d) of subdivision one of section six hundred fourteen are supported by a fair preponderance of the evidence." Fam. Ct. Act §622.

Specifically, respondent offered testimony, through two case workers assigned to the family, that he had arranged and offered the eleven services enumerated in paragraph six of the petition set forth above. [J.A. 31]

Although the petition alleged that petitioners failed to maintain contact with their children, testimony clearly indicated that petitioners never missed a visit with their children which was arranged by respondent. [T. 50] In the words of the decision of the Family Court, "It was not contended nor was any proof offered at trial that the parents had failed to maintain contact with their children. On the contrary it is conceded that they have through their counsel, diligently sought to have permitted to them such contact through supervised visits as the agency would allow." [J.A. 20] In fact, early in 1977, only one month after the Family Court denied respondent's first attempt to terminate petitioners' parental rights, respondent himself sought to eliminate visitation altogether and petitioners' right and desire to visit had to be restored through the intervention of the Family Court. [T. 50, 53-59; J.A. 20]

Rather than attempt to prove that petitioners failed to maintain contact with their children, respondent contended (as in his first effort to terminate petitioners' parental rights) that petitioner's failed "to plan for the future of their children" within the meaning of the statute.[5]

Respodnent attempted to prove that petitioners failed to plan principally by showing that petitioners rejected several of the services offered to them. Nevertheless, respondent's own witness, caseworker *Dan Lucy*, testified that petitioners

[5]Under New York substantive law, failure to plan for the future of one's child, in and of itself, is sufficient to support a finding of permanent neglect. *Matter of Orlando F.*, 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976).

had accepted Family Service Counseling [T. 59], accepted the services of a nutritional aid [T. 62], and never rejected the services of a public health nurse. [T. 65]

Caseworker *Lynn Davis,* another one of respondent's witnesses, testified that the mother made every visit with her children ever held or offered by the agency [T. 89-90], that during the visits petitioners displayed an attempt at affection toward the children [T. 128] and that during the visits the mother consistently asked the two older children how they were doing in school. [T. 129]

Of the services offered by respondent, the record indicates that petitioners were accused of refusing five, but the circumstances under which they were "refused" casts doubt upon the accusation that they were rejected at all. First, they refused to participate in the Child Enrichment Program because it required them to bring to the Family Service Center the two children over whom they still had custody. Ms. Davis acknowledged that petitioners did not trust the Department of Social Services [T. 155] and that the reason the mother did not participate in the Child Enrichment Program was because of her fear that the two children currently in her care might be taken by respondent, as had been done to Jed at the hospital when he was born. [T. 156-158, 257] Second, petitioners refused the offer of psychiatric counseling at Southern Ulster Mental Health Center because they had received counseling there a number of years before which they considered ineffective. In its place, petitioners preferred to continue and did continue regular counseling sessions with the more successful Family Service Center, a duly authorized counseling agency of respondent. [T. 158-162, J.A. 16-18] Third, the mother rejected the offer of Planned Parenthood services because she planned to have a tubal ligation after the birth of her last child. [T. 106]

Fourth, the mother rejected the offer of Homemaker Service because she was receiving nutritional and homemaking services by the Cooperative Extension Department of Home Economics on a regular basis throughout the period of the children's placement. [T. 167, 267-274] Finally, the father stopped participating in employment related educational services offered by respondent in November 1977 because he obtained a non-paying job as an apprentice auto mechanic. [T. 131-132, 293-297] There is no dispute that petitioners fully participated in and accepted all of the other services offered.

There was also testimony that one of the reasons Ms. Davis concluded that petitioners failed to plan for the return of their children was that petitioners became the parents of a fifth child while the first three were still in respondent's custody. [T. 166]

Additionally, *Anna Whaley,* a nutritional aide who serviced petitioners over a period of several years, testified for petitioners that the mother kept a tidy kitchen and home [T. 275], that she dound the petitioners cooperative over many years [T. 271-273] and that she noticed an improvement in petitioners' budgeting capabilities [T. 283].

Millicent Van Demark, a Public Health Nurse, testified that petitioners have two children in their home, James and Jeremy [T. 393], that on one occasion the mother requested and received for James a speech and hearing evaluation [T. 395] and that no report of abuse or neglect of these two children had been made. [T. 397-398]

After all of the testimony was in, the attorney for respondent, argued, *inter alia,* in summation: "We feel that the fair preponderance of evidence requires a finding of permanent neglect." [T. 418] On March 12, 1979, Judge Elwyn issued a decision that statutory grounds existed to

conclude that the children had been permanently neglected. In his decision Judge Elwyn reviewed the testimony and held:

> I therefore conclude that the record in case supports by a preponderance of the evidence a finding that there has indeed been a failure on the part of these parents to "plan for the future of [their children] although physically and financially able to do so." [J.A. 37]

The court devoted two full pages to a discussion of petitioners' claim that the standard of proof required by section 622 of the Family Court Act was unconstitutional. After noting that the Attorney General had been notified and elected not to appear, the court stated that "a finding of unconstitutionality should not be lightly undertaken by courts of first instance." The court explicitly decided to terminate petitioners' parental rights "upon the standard of proof prescribed by the statute—'a fair preponderance of the evidence.' " [J.A. 29-30]

On April 5, 1979, the Family Court held a dispositional hearing and ruled that the best interests of all three of the children require that their parents' custody be terminated permanently and that the guardianship and custody of the children be committed to respondent. [J.A. 39-40] On the same date, the court issued final orders terminating petitioners' parental rights. [J.A. 41-46]

Petitioners then appealed directly to the Court of Appeals, claiming that the sole issue involved was a constitutional question. [J.A. 47] Shortly after the Notice of Appeal was filed, the Family Court, on May 8, 1979 stayed all proceedings to enforce the order it issued on April 5 including the authority of respondent to consent to an adoption of the children pending the outcome of petitioners' appeal. [J.A. 48-29]

On June 14, 1979 the Court of Appeals declined jurisdiction lby ruling that issued other than the constitutional question were involved. The court transferred the matter to the Appellate Division, Third Department. [J.A. 50]

After full briefing on appeal, the Appellate Division affirmed the orders of the Family Court, and in doing so, it upheld the constitutionality of section 622, adhering to an earlier decision on the same issue. In following the earlier case, the court noted that

> the permanent neglect statute . . . recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents . . . Accordingly, application of the preponderance of evidence standard in such a proceeding involving these often conflicting rights is proper and constitutional. [J.A. 51]

Petitioners again appealed to the New York Court of Appeals challenging the constitutionality of section 622 [J.A. 54] which dismissed the appeal on September 16, 1980 upon the ground that no substantial constitutional question was directly involved. [J.A. 55]

Finally, petitioners petitioned this Court for a writ of certiorari to the Appellate Division, Third Department and, on March 23, 1981 this Court granted the writ.

SUMMARY OF ARGUMENT

The Ulster County Department of Social Services succeeded in severing, permanently and irrevocably, the parent-child relationship of petitioners and three of their children by presenting evidence which established merely that the existence of certain facts was more probable than their non-existence. The New York statute expressly

authorizes termination of parental rights based on a standard of proof which is designed to result in erroneous findings a substantial percent of the time. The Constitution prohibits state action which destroys "essential," "basic" and "fundamental" liberty interests of citizens on the basis of such uncertainty.

The total extinction of a familial relationship between children and their parents is among the most drastic measures that a State can impose. Before a State may interfere with basic rights to this degree, it should be obliged to present a convincing case. Raising the standard of proof in parental rights termination cases will do much to reduce erroneous and inappropriate permanent separation of parents and their children.

Not only does the decision to terminate parental rights interfere in a drastic way with fundamental rights, the substantive basis for the decision is highly subjective. As a result, the error margin is even greater than when a decision is based on objective, hard facts. In New York, for example, parents who comply with all of the obligations imposed upon them by statute, may nevertheless find their parental rights terminated if a court finds an absence of "concerned parenthood."

The subjective basis for termination poses a particular danger that termintion will be inappropriately ordered. A significant risk exists that decisions to terminate are based on cultural and class biases. A disaproportionate proportion of parents whose parental rights are involuntarily seevered are poor.

In addition, a county prosecuting a termination proceeding may have an economic incentive to win the hearing, saving forster-case money once the child is adopted. The county may spend unlimited sums prosecuting the case. By

contrast, the indigent parent is entitled to assigned counsel in New York who earns a maximum of $500. Finally, the risk that courts will interpret the preponderance of evidence standard to signify *weight* rather than *quality* is exacerbated in these circumstances.

Though the State has a *parens patriae* interest in helping children in need, no State interest is served by wrongfully terminating a parent-child relationship. The State should be obligated to prove a convincing case for termination before a court may order the permanent destruction of a family.

ARGUMENT

POINT

SECTION 622 OF THE NEW YORK FAMILY COURT ACT, INSOFAR AS IT PERMITS A FINDING OF PERMANENT NEGLECT AND TERMINATION OF PARENTAL RIGHTS BASED UPON A PREPONDEANCE OF THE EVIDENCE, VIOLATES DUE PROCESS OF LAW.

This case requires the Court to decide whether parents may have their rights terminated involuntar y and permanently, based upon proof which has not been established by at least clear and convincing evidence. Alternatively phrased, this case raises the question whether the Due Process Clause of the Fourteenth Amendment is offended when parental rights are terminated based upon a mere showing of a preponderance of evidence. In deciding this single, narrow issue, the Court is not required to consider the substantive bases upon which termination decisions are based.[6]

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[6]Petitioners have not challenged New York's substantive standards for terminating their parental rights. Several courts have in recent years addressed substantive standards in termination cases. *E.g. Roe v. Conn,*

(continued)

A. Whether Process Is Due?

To determine what process, if any, is due, the first inquiry for the Court is whether petitioners have asserted an interest which is within the Fourteenth Amendment's protection:

> [T]o determine whether due process requirements apply in the first place we must look not to the "weight" but to the *nature* of the right at stake . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 841 (1977) (citing *Board of Regents v. Roth,* 408 U.S. 564, 570-71 (1972).

It is well settled that "the right . . . to raise one's children" is fundamental, and that the "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment is impaired by the permanent separation of parents and children. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Summarizing illustrative decisions, the Court there stated:

> The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson,* 345 U.S. 528, 533 (1953) . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* at 399 . . .

(footnote continued from preceding page)

417 F. Supp. 769 (M.D. Ala. 1976); *Alsager v. District Court, Iowa,* 545 F.2d 1137 (8th Cir. 1976), *affirming per curiam* 406 F. Supp. 10 (S.D. Iowa 1975); *Davis v. Smith,* 266 Ark. 112 583 S.W.2d 37 (1979). Earlier this Term, this Court had the opportunity to address substantive standards as well as the issue which is raised in this case, but dismissed the appeal "for want of a properly presented question." *Doe v. Delaware,* ____ U.S. ____, 49 U.S.L.W. 4250 (1981).

The rights of the family to be free from significant state interference is recognized as fundamental in American jurisprudence. The right of parents to raise their children is a pre-constitutional right "having its origins entirely apart from the power of the State," *Smith v. Oranization of Foster Families for Equality and Reform*, 431 U.S. at 845 "deeply rooted in our Nation's history and tradition," *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) and "as old and as fundamental as our entire civilization," *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1965) (Goldberg, J. concurring).

As this Court recently articulated, "the tradition of parental authority is . . . one of the basic presuppositions of individual liberty." *Bellotti v. Baird*, 443 U.S. at 638.[7] The Court has recognized not only the privacy and integrity of family life but also the unique and special social function that the family serves.

In *Moore v. City of East Cleveland*, the Court said

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. 431 U.S. 494, 503-504 (1977) (footnotes omitted).

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[7]The Court has recognized a right of parents or families to be free from unnecessary state interference under a theory of *privacy*, e.g. *United States v. Orito*, 413 U.S. 139, 142 (1973); *Roe v. Wade*, 410 U.S. 113, 152-53 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *liberty*, e.g. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632–639-40 (1970); *Wisconsin v. Yoder*, 406 U.S. 205, 230-35 (1972); *Stanley v. Illinois*, 415 U.S. 645, 651 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400-03 (1923); or *integrity*, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961).

These cases demonstrate beyond question that freedom to raise one's children without unnecessary state intrusion into family relationships is protected by the Due Process Clause of the Fourteenth Amendment. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-40 (1974).

B. What Process Is Due?

Having determined that petitioners have a liberty interest in retaining their parental ties to their children, which is protected by the Due Process Clause of the Fourteenth Amendment, the question remains, what process is due. In determining the exact parameters of procedural safeguards required by the Due Process Clause, this Court has promulgated a three-prong test:

> First the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Applying this test to the issue raised in this case requires a determination that the preponderance of the evidence standard is constitutionally inadequate.

1. Private Interest Affected Is Fundamental

One of the most significant factors to be considered in determining the scope of due process protection is the nature of the priate interest affected by the official act. *Mathews v. Eldridge,* 424 U.S. at 335. In this case the state deprived

petitioners—permanently—of their right to raise, visit with, shape the future of and be related to three of their children. It is scarcely possible to conceive of a right more fundamental in a constitutional sense, or one which has been more scrupulously protected by this Court.

Although the severity of the loss does not of itself establish that an interest deserves constitutional protection, this factor does weigh heavily in determining the procedural safeguards mandated by the Fourteenth Amendment. *See Gross v. Lopez*, 419 U.S. 565, 575-576 (1975). Recently, the Fifth Circuit Court of Appeals commented: "It is difficult to imagine a loss more grievous than that of a parent deprived of his or her child. The bond between parent and offspring is one of the central facts of nature as well as of society and the Supreme Court has frequently noted the fundamental character of this relationship." *Davis v. Page*, 640 F.2d 599, 603 (5th Cir., 1981) (en banc).[8]

The Third Circuit also had occasion very recently to characterize involuntary permanent termination of parental rights

> The total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions, to protect disadvantaged or neglected children. The termination of the mother's rights in her children is, in effect, a declaration to the children that their mother is legally dead. *Lehman v. Lycoming County Children's Services Agency*, ____ F.2d ____, ____ (3rd Cir. 1981) (en banc) (Rosenn, J., dissenting).

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[8]The original Panel which decided *Davis* was even more emphatic:

> [The l]oss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. *Davis v. Page*, 618 F.2d 374, 379 (5th Cir., 1980).

See also, In re William L., 477 Pa. 322, 370, 383 A.2d 1228, 1252 (Manderino, J., dissenting), *cert. denied*, 439 U.S. 880 (1978). "When parental rights are terminated, the child is dead so far far as that parent is concerned." Indeed, termination has been called the "death penalty" for parents of dependent or neglected children. Catz & Kuelbs, *The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. Fam. L. 223, 233 (1974).

There can be little doubt that termination of the parent-child relationship entails a "significant deprivation of liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979). While there may be no threat of jail, a clear form of physical separation from one's family is imposed when a parent is told he or she will never again live in the same household or never again have any other continuing relationship—even visitation—with his or her own child. Termination "is even more final than involuntary commitment or delinquency proceedings," *State v. Robert H.*, 20 N.H. 90, 393 A.2d 1387, 1389 (1978) and a "drastic, final step which, when improvidently employed, can be fraught with danger," *Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976).

When the state seeks to extinguish the tie that binds parent to child permanently, only the most "powerful countervailing interest[s]" can outweigh the rights abridged by termination. *See, Stanley v. Illinois*, 405 U.S. at 651. When fundamental rights are absolutely threatened, the Constitution requires that the proposed state intrusion be tailored precisely to fit the legitimate end the state seeks to achieve. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). As a result of these principles, the only two federal courts which have addressed the issue, have held that termination proceedings

must be proven by clear and convincing evidence. *Sims v. State Dept. of Public Welfare,* 438 F. Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds sub nom., Moore v. Sims,* 442 U.S. 415 (1979); *Alsager v. District Court,* 406 F. Supp. at 25, *aff'd on other grounds,* 545 F.2d 1137.[9]

2. The Risk of Erroneous Deprivation Is High.

The second element to be considered in determining what process is due is the value of additional procedural safeguards and the extent to which they will prevent an erroneous deprivation of rights. *Mathews v. Eldridge,* 424 U.S. at 335. As a due process protection, a heightened standard of proof serves an integral and often determinative role in limiting governmental overreaching.

Indeed, this prong of the *Mathews* test hardly needs discussion in the context of the necessary degree of proof. The explicit purpose of raising the standard from a mere preponderance of evidence is to reduce erroneous decisions. This Court has recognized this function in unequivocal terms:

> There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value . . . this margin is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of [the salient facts by a higher standrd than mere preponderance of evidence]. In *re Winship,* 397 U.S. 358, 364 (1970) (citing *Speiser v. Randall*), 357 U.S. 513 (1957).

[9]Recently, a New York Family Court Judge expressed her view in *dictum* that the Constitution requires the finding of permanent neglect to be made by clear and convincing evidence. *In re Marilyn H.,* ___ Misc.2d ___, 7 Fam. L. Rep. 2347 (Fam. Ct. N.Y. Cty. February 24, 1981).

The standard of proof ultimately "reflects the value society places" on the interest at stake. *Addington v. Texas,* 441 U.S. at 425. It also "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship,* 397 U.S. at 370 (Harlan, J., concurring). As Justice Harlan explained, "[T]he choice of the standard for a particular adjudication does . . . reflect a very fundamental assessment of the comparative social costs of erroneous factual determination." *Id.*

The "social costs" of erring in the unnecessary destruction of a family are appalling indeed. For this reason, and because the right to live as a family is fundamental and constitutionally protected, a standard of proof which permits the court to err on one side as easily as the other offends the very essence of due process of law. *In re Winship, supra.*

As demonstrated in the previous section, the rights at issue in this case are among our most precious. As a result, this case is easily distinguishable from the typical civil proceeding. Where the interests are essentially proprietary, that is, in "the general run of issues in civil cases" [McCormick, *Evidence* §319, (1972)], the preponderance test is appropriate. Where the interests are more significant, for example in cases involving allegations of civil fraud, legitimacy of a child, adultery, or lost wills, a higher standard is required. *See Woodby v. Immigration and Naturalization Service,* 385 U.S. 276, 285 n.18 (1966); McCormick, *Evidence* §§319, 320. *See also, Rosenbloom v. Metromedia,* 403 U.S. 29, 50-52 (1971) (plurality opinion) (civil libel action involving First Amendment protection). When the State contends that the basic right of parenthood must be forsaken, it assumes an onerous burden of proof. Congress,

for example, requires proof beyond a reasonable doubt before Indian parental rights may be permanently terminated, 25 U.S.C. § 1912(f) (1981 Supp.), reasoning, in part, that permanent termination "is a penalty as great, if not greater, than a civil penalty . . ." 6 U.S. Cong. & Adm. News 7545 (1978).[10]

The standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. at 423. There can be no doubt that both the parent and the child have a significant interest in preventing the erroneous termination of this fundamental human relationship. Moreover, the gravity of an improvident termination decision is underscored by the fact that, unlike an initial erroneous decision to commit an individual to an institution, which may be corrected when the individual's case is periodically reviewed by the professional staff, the decision to terminate the parent-child relationship permanently and irrevocably destroys the family unit. *Cf. Addington v. Texas*, 441 U.S. at 428-429. Under these circumstances, the standard of proof in a termination proceeding must be at least equal to the standard required in civil commitment cases.

a. New York's Substantive Basis for Termination is Highly Subjective.

The import of a heightened standard of proof for protecting parents from erroneous decisions is clearly illustrated by

[10]*See also Moore v. Sims*, 442 U.S. 415, 423 (1979) wherein this Court, recognized, albeit in a different context, that child abuse proceedings are "in aid of and closely related to criminal statute."

its practical application in the termination hearing. In any proceeding, the correctness of the factfinder's ultimate conclusion can never be established with absolute certainty. Whether a higher stanard of proof should be imposed, partially depends on the inherent certainty of the underlying facts which cumulatively add up to the ultimate decision. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 Cal. L. Rev. 242 (1944). The less certain each of the elements of proof are, the less certain the cumulative conclusion. One way of increasing the certainty of a conclusion based on highly subjective evidence is to raise the standard proof.[11]

It has long been recognized that child protective cases may too easily be decided on the subjective values of the judges. As this Court has noted: "Judges . . . may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. at 835, n.36. *See, also,* Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication,* 44 Brooklyn L. Rev. 63, 64, n.4 and 79, n.103 (1977).[12]

[11]The common law traditionally imposed a higher standard of proof—clear and convincing evidence—on litigants whose claims were based on the less reliable *oral* evidence, e.g. for the existence and contents of a lost deed or will or for an oral contract. *See* 9 Wigmore, *Evidence* § 2498 (3d ed. 1940 Supp. 1980).

[12]In one study in which three experienced juvenile court judges were given files concerning fifty actual families and asked if the parents' rights in their children should be terminated, the judges agreed in less than one-half of the cases. "Even in cases in which they agreed on the decision, the judges did not identify the same factors as determinants, each seeming to operate to some extent within his own unique value system." Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Ed. Rev. 599, 619 (1973).

New York's substantive standards for terminating parental rights are highly subjective. Social Services Law §384-b(7)(a) provides:

> "Permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationships when such efforts will not be detrimental to the best interests of the child . . ."

Thus, the three critical issues upon which courts must focus in permanent neglect proceedings are the duty of parents to 1) maintain contact or 2) plan, and the duty of the agency to 3) utilize diligent efforts to encourage and strengthen the family. New York court interpretations have made it clear that these standards are not objective.

i. Maintain Contact.

A parent may not, for a period of one year, fail to "substantially and continuously or repeatedly" maintain contact with the child. Maintaining contact by itself will not preclude a court from terminating parental rights. Soc. Serv. L. §384-b(7)(b) clearly provides that "evidence of insubstantial or infrequent contacts by a parent with his or her shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child." In addition, a visit or communication by a parent with the child which "overtly demonstrate(s) a lack of affectionate and concerned parenthood" may be disregarded as insubstantial. *Id.*

ii. Plan for the Future.

A parent who fails to "substantially and continuously or repeatedly" plan for the future of the child may permanently lose parental rights. By statute, planning is defined as

> such steps as may be necessary to provide an adequate, stable home . . . within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. Soc. Serv. L. § 384-b(7)(c).

When is a plan "realistic"? When is a period of time "reasonable under the financial circumstances available to the parent"? New York's highest court has ordered permanent termination in a case where, though proof of a plan by the parents existed, a preponderance of the evidence supported the conclusion that the parents failed "to formulate, and act to accomplish, a feasible and realistic plan." *Matter of Orlando F.*, 40 N.Y.2d 103, 111, 386 N.Y.S.2d 64, 68 (1976).

The Court of Appeals in New York has recognized that

> the planning also obligates the parents to project a future course of action, taking into account considerations of how the child will be supported financially, physically and emotionally. Certainly, a degree of prescience and insight that some people lack—especially the parents of a child who has been involuntarily removed from their custody—is demanded. For this reason, the adequacy of the parents' plan must not be evaluated with reference to unrealistically high standards. *Matter of Leon R.R.*, 48 N.Y.2d 117, 125, 421 N.Y.S.2d 863, 868 (1979).

The preponderance of evidence standard permits an inordinate risk that the plan will be evaluated with reference to unrealistically high standards.[13]

iii. Agency's Diligent Efforts.

As a general rule, a finding of permanent neglect may only be made if the agency utilized "diligent efforts to encourage and strengthen the parental relationship." Soc. Serv. L. §384-b(7)(a). However, the Court of Appeals has interpreted the law so that "(d)iligent efforts at encouraging and strengthening the parental relationship may not be made at the expense of the moral and temporal welfare of the child." *Matter of Ray A.M.*, 37 N.Y.2d 619, 621, 376 N.Y.S.2d 43, 433 (1975). *See* Fam. Ct. Act §614(c).

Thus, under New York law a court may terminate parental rights where it finds by a preponderance of evidence that a) the absence of diligent efforts by an agency to reunite the parentand child was excusable as not being in the child's best interests and b) even though the parents have maintained contact or planned for the future of the child in good faith, there was an absence of "concerned parenthood" or the plan was not "realistic."

New York law expressly permits terminating parental rights irrespective of the subjective intent of the parent to maintain contact with, abandon or plan for the return of the

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[13]A higher standard of proof is needed in termination cases than in ordinary civil cases, in part "(b)ecause precedent is of little value, [and] adequate protection of the parental right requires that the decision makers be well convinced of the appropriateness of termination." Note, *Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine*, 12 Tulsa Law J. 528, 542 (1977).

child. Soc. Serv. L. § 384-b(5)(b). This stands in sharp contrast with *Vance v. Terrazas*, 444 U.S. 252, 270 (1980) in which this Court allowed a citizen to lose his citizenship based upon a preponderance of the evidence which proved that the citizen actually possessed "an intent to relinquish citizenship." It is because "expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship" and that this is a "heavy burden" for the Government to meet, that the preponderance standard was found to be constitutionally acceptable. *Vance v. Terrazas*, 444 U.S. at 267.

b. Termination Proceedings Are Particularly Vulnerable to Cultural and Class Bias.

In addition to the subjectivity of the substantive law itself, other factors involving termination proceedings indicate the need for a higher standard of proof. Among these are the possibility of cultural and class bias and the comparative advantage which the state enjoys over the parents in the termination hearing.

The vast majority of parents who are accused of inadequate parenting are indigent.[14] Termination proceedings

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[14] "Nationwide data on the income of families placed in foster care do not exist, but statewide studies indicate that at best eighty to ninety percent of such families are below the poverty line and the majority receive public assistance." McCathren, *Accountability In the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect*, 57 B.U.L. Rev. 707, 711-712, n.17 (1977) and authorities cited therein.

See, also Dembitz, *Child Abuse and the Law—Facts and Fiction*, 24 Record of N.Y.C.B.A. 613, 623 (1969); Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 Fam. L. Q. 245, 262 (1974); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for*

(continued)

have been attacked on the basis of cultural and class prejudice. [15]*Cf. Smith v. Oranization of Foster Families for Equality and Reform*, 431 U.S. at 833-35. *See also*, P. Murphy, *Our Kindly Parent—The State*, 153-63 (1974).

Even where bias is eliminated, the poor frequently are disadvantaged. Typically, counsel for the poor is assigned by the court and, in New York paid a modest hourly fee to a maximum amount even lower than an assigned attorney may receive by representing a defendant accused of a felony. New York County Law §722b (McKinney Supp. 1980).

(footnote continued from preceding page)

Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625, 692, n.269 (1976); S. Katz, *When Parents Fail*, at 28-29 (1971); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo L.J. 887, 892-93 (1975); Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 Calif. L. Rev. 694 (1966); Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Ed Rev. 599, 603 (1973); Bourne & Newberger, *"Family Autonomy" or "Coercive Intervention?", Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect*, 57 B.U.L. Rev. 679, 691 (1977); Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 Am. J. Orthopsychiatry 608 (1978); Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interest of the Child*, 78 Mich. L. Rev. 645, 689 (1980); S. Jenkins & E. Norman, *Filial Deprivation and Foster Care* (1972) pp. 2, 25-30; Hay & Phillips, *Poverty and the Law of Custody*, 54 Calif. L. Rev. 717 (1966); ten Broek, *California's Dual System of Family Law: Its Origins, Development and Present Status (Part I)*, 16 Stan. L. Rev. 257; *(Part II)*, p. 900 (1964); *(Part III)*, 17 Stan. L. Rev. 614 (1965); Jenkins, *Child Welfare as a Class System, in Children and Decent People* (Schorr ed. 1974); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833-34 (1977).

[15]In enacting the Indian Child Welfare Act, 25 U.S.C. §§1901 et seq. (1980), Congress found that many of these same evils existed in child custody proceedings involving Indian families. As a result, Congress required that in a proceeding to terminate the parent-child relationship the evidence supporting termination be established beyond a reasonable doubt. 25 U.S.C. §1912(f).

The agency, by contrast, is represented by a county attorney or privately retained counsel. There are no pre-determined limitations set on the amount of money an agency may spend in prosecuting a termination proceeding, confronting the parent with "the full panoply of the traditional weapons of the state." *Davis v. Page*, 618 F.2d at 380. Moreover, there is frequently an incentive to succeed in obtaining a termination order. Where a particular child is considered "adoptable," the state may favor termination of parental rights both because termination assists in satisfying the demand for "adoptable" children and because it relieves the state from the financial burden of providing either institutional and foster care or public services that might be necessary for the reinforcement or rehabilitation of the child's natural family. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. C.R.-C.L.L. Rev. 564, 575 (1976).[16] *See also*, Areen, *"Intervention Between parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,"* 63 *Georgetown L.J.*, 887, 893-94 (1975).

Before the child is adopted, counties expend considerable money, both for services provided to parents and payments to foster parents for caring for the children. These payments usually cease upon adoption. Thus, it is to a county's economic advantage to spend an amount necessary at the termination hearing to maximize the probability of a successful outcome. The preponderance of the evidence standard exacerbates this problem.

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[16]In fiscal year 1978, the City of New York spent over $300 million for the foster care of approximately 26,000 children. Office of the New York City Council President, *Good Money After Bad: An Analysis of Expenditures and Performance in Private-Sector Foster Care* (1979).

c. The Preponderance Standard Can Be Misleading.

Chief Justice Burger has observed respecting the standard of clear and convincing evidence that "the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable." *Addington v. Texas,* 441 U.S. at 424-425. At the least, however, clear and convincing evidence precludes an adverse finding against a parent which would otherwise be satisfied by evidence which merely establishes that facts favoring termination are more probable than their non-existence. *Cf.* McCormick, *Evidence,* § 339.[17] In concluding that parental rights should be permanently severed, the constitution requires that the finder of fact be persuaded that the quality of the evidence clearly mandates the outcome.

A problem related to the preponderance standard is that it may be misleading to judges and might suggest that only the *quantity* and not the *quality* of the evidence is what matters. As Justice Harlan pointed out, concurring in *In re Winship,* at least some commentators or courts view the preponderance test as a requirement to weigh in some objective sense the quantity of evidence submitted by each side rather than a requirement that the trier of fact decide what he believes most probably happened. 397 U.S. at 371 n.3. There is especial danger that weight rather than quality will be determinative in termination proceedings in light of the inequitable allocation of resources typically available to agencies and parents in termination proceedings.

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[17]As this Court has recognized, "To experienced lawyers, it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall,* 357 U.S. at 520-521.

Indeed, there is evidence in this very case that the preponderance standard confused at least one attorney and one court. There is no indication in the record that the trial judge based his decision on the fact that petitioners failed to testify at the trial. However, the attorney for one set of foster parents argued to the New York Court of Appeals, in support of a motion to dismiss petitioners' appeal, that since petitioners did not testify at their trial, they were

> unable to refute the evidence that they never substantially planned for the return of their children. Furthermore, by their failure to take the stand, the [petitioners] waived their right to contest the constitutional issue because they failed to give evidence to even show, by a mere preponderance of the evidence, tha tthey substantially performed. Since both [the agency] and [petitioners] have dual burdens to prove in a permanent neglect proceeding, it would be inequitable to have the agency's burden to be greater than the one for [petitioners]. [Affirmation of Wilfrid E. Marrin, Esq., dated July 3, 1980.]

A preponderance standard is so low that at times a court may become confused as to which party bears the burden of proof in the first place. When respondent failed in the Family Court in his effort to terminate petitioners' parental rights the first time, he appealed to the Appellate Division. That Court affirmed the Family court's decision not to terminate. However, even though it is clear that New York's statute places the burden upon the *county* (albeit by a mere preponderance of evidence) of proving, *inter alia,* that the parents have failed to maintain contact or plan for the future of their children, the Appellate Division affirmed based on the reasoning that "Considering the record as a whole, *we are of the opinion that respondents have substantially planned for the future of the children. . . .*" *Matter of John*

W., 63 A.D.2d 750, 751 404 N.Y.S.2d 717, 719 (Third Dept. 1978) (emphasis supplied). The Appellate Division therefore mistakenly assumed that petitioners had a burden to prove that they had planned for their children's future.

3. The State's Interests Are Consistent With Preventing Unnecessary Terminations.

a. *Parens Patriae*

The State's interest in the termination proceeding is the final element in the assessment of what standard of proof is required by due process. *Mathews v. Eldridge*, 424 U.S. at 335. Although the State has multiple interests, one of them is its *parens patriae* interest to provide a permanent home for children. Soc. Serv. L. § 384-b(1)(a)(iv). The Appellate Division relied upon this purpose in upholding the statute:

> [W]e note that the permanent neglect statutue . . . recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents. . . . Accordingly, application of the preponderance of evidence standard is such a proceeding involving these often conflicting rights is proper and constitutional. [J.A. 51]

This reasoning, however, is faulty. New York recognizes—by statutory declaration—that children and parents should be together if at all possible. In enacting the legislation which authorizes courts to terminate parental rights, the legislature specifically declared:

> (i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite if if the child has already left home. Soc. Serv. L. § § 384-b(1)(a)(i), (ii), (iii).

The New York Court of Appeals has recently reemphasized the state's interests in keeping families together and avoiding needless terminations.

> One of the fundamental values in our society is that which respects and fosters the relationship between parent and child. Thus, our permanent neglect statute reflects a cultural judgment that society should not terminate the parent-child relationship unless it has first attempted to strengthen it. *Matter of Leon R.R.*, 48 N.Y.2d at 126, 421 N.Y.S.2d at 869.

At some point when children have been separated from their parents for a significant period of time, termination of parental rights may be appropriate. Thus, New York law posits

> *when it is clear* that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child. Soc. Serv. L. § 384-b(1)(a)(iv) (emphasis supplied).

The only issue before this Court is how best to assure that the decision to terminate is "clear," since New York has no *parens patriae* interest in inappropriately terminating parental rights. A termination proceeding is a conflict between the parents and the state. It may or may not be a

conflict between the parents and their children. The right to family autonomy is a reciprocal right belonging both to children and their parents. *See, Stanley v. Illinois,* 405 U.S. at 647, 652; Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Authority,* 86 Yale L.J. 645, 627, n.8 (1977).

The Second Circuit has recognized that the "right to the preservation of family integrity encompasses the reciprocal rights of both parent and children." *Duchesne v. Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977). More recently, four judges on the Third Circuit had occasion to say that the right of family integrity "encompasses not only the parent's right to nurture, educate, love and manage their children but the children's right to remain with and be raised by their natural parents." *Lehman v. Lycoming County Children's Services Agency,* ____ F.2d ____, ____ (3rd Cir. March 31, 1981) (en banc) (Rosenn, J., dissenting) (slip opinion).

There can be no presumption that the State is serving the child's interests, nor its own *parens patriae* interest, in seeking to terminate parental rights. The State is simply "too crude an instrument to become an adequate substitute for flesh and blood parents." J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 12 (1979).

Under New York law, it is far from certain that terminating the parent-child relationship will be of any value to the children affected by the order. A finding of permanent neglect may be the first step in a lifetime of alienation from anyone who is truly concerned about the child. In termination proceedings "proof of the likelihood that the child will be placed for adoption shall *not* be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency." Soc. Serv. L. § 384-b(1)(a)(i) (emphasis supplied).

As this Court has recognized:

> [E]ven when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable home life through final termination of parental ties and adoption into a new permanent family. *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. at 837-838.

Since adoption is neither a legally necessary predicate nor a realistic expectation of many children who become wards of the State, other forms of custodial care, such as institutionalization, must be utilized with unfortunte and disastrous consequences. Long-term foster care, which is the State's principal alternative resource, can never replace nurturing advantages lost to the child from the breakup of his natural family, and may be distinctly inimical to the needs of children. *See* Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Educ. Rev. at 605-6; *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. at 856 (concurring opinion, Stewart, J.). While the familial environment may be adjudged deficient by predominating standards, the State's intervention, however benevolently intended, may provide equally undesirable or worse alternative. *Alsager v. District Court,* 406 F. Supp. at 23. It is for these reasons that "(w)hen the state contravenes parental decisions in child rearing with the claimed purpose of benefitting the child, the state must present a convincing case that its intervention, in fact, will serve its expressed goal." Burt, *Developing Constitutional Rights Of, In and For Children,* 39 Law & Contemp. Prob. 118, 127 (1975). The higher burden of proof thus protects the parents' interests as well as the rights of children to the care and protection of their parents. The Model Act to Free Children for Permanent Placement drafted by Professor Katz for the Department of Health, Education and Welfare, requires the

clear and convincing standard because it provides "the fairest measure for weighing the claims of the competing interests." Katz, *Freeing Children for Permanent Placement Through A Model Act,* 12 Fam. L. Q. 203, 240 (1978).

The use of the clear and convincing standard reflects the underlying premises of the Constitution and state policy that maintenance of the family unit is the preferred solution by reducing the likelihood of erroneous decisions to terminate the parent-child relationship. Given the parent's interest, the child's interest and the state's interest to avoid a wrongful termination, a higher standard of proof than mere preponderance of evidence actually furthers the interests of all concerned.

b. Fiscal and Administrative Burden

The imposition of a higher standard of proof imposes upon the state no greater fiscal or administrative burden than exists under the present system. No hearing is being requested where one does not exist; no court-appointed counsel with great public expense is desired; no right to appeal nor free transcript is sought. Appellants seek only a shift in focus—an intellectual exercise only—of an already-established process. The speed with which termination cases may proceed and the form of the proceedings will be unaffected by a heightened standard of proof.

Moreover, New York has utilized, with no apparent negative effects, "clear and convincing" proof in a number of analogous contexts. For example, whre the state wishes to terminate parental rights based upon parental mental illness or retardation, the statute requires clear and convincing

evidence. Soc. Serv. L. § 384-b(3)(g). New York also requires clear and convincing proof "to the point of entire satisfaction" in paternity proceedings. *Matter of Renee G. v. William H.*, 46 A.D.2d 823, 360 N.Y.S.2d 514 (3rd Dept. 1974); *aff'd*, 39 N.Y.2d 812, 385 N.Y.S.2d 763 (1976). It is ironic that in New York it is more difficult to prove someone is a parent than it is to destroy the parent-child relationship.

In addition, actions for reformation (*Ross v. Food Specialities, Inc.*, 6 N.Y.2d 336, 189 N.Y.S.2d 857 (1959); and actions based on a claim against a deceased (*Matter of Cady*, 211 App. Div. 373, 207 N.Y.S. 385 (4th Dept. 1925) must be proven by clear and convincing evidence in New York. Even hearing to suspend driver's licenses require clear and convincing evidence in New York. New York Vehicle and Traffic Law, § 227(i) (McKinney Supp. 1980).

Additionally, the administrative burden on the State cannot be too great in light of the fact that thirty-five states require a standard of proof higher than New York's in termination cases. One state—South Dakota—requires a "clear preponderance of evidence." *Matter of B.E.*, 287 N.W.2d 91 (S.D. 1979). Two states—New Hampshire and Louisiana—require proof beyond a reasonable doubt to terminate parental rights. *State v. Robert H., supra;* La. Rev. Stat. Ann. § 13:1603.A (Supp. 1981). And thirty-two states require clear and convincing evidence in termination proceedings, thirteen by statute and nineteen by case law.[18]

[18] *Alabama—Dale County Dep't of Pensions v. Robles*, 368 So.2d 39 (Ala. Civ. App. 1979); *Alaska—Alaska Code* § 47.10.080(c)(3)(D) (1979); *Arkansas—Harpur v. Caskin*, 265 Ark. 588, 580 S.W.2d 176 (1979); *California—Cal. Civ. Code*, § 232(a)(7) (West. Supp. 1980); *District of Columbia—Matter of Adoption of J.S.R.*, 374 A.2d 860 (D.C. 1977); *Florida—In Interest of C.K.G.*, 365 So.2d 424 (Fla. Dist. Ct. App., 2d Dist. 1978); *Georgia—Ga. Code Ann.*, § 24A-2201(c) (1976); *Illinois—Blakey v. Blakey*, 72 Ill. App. 3d 946, 391 N.E.2d

(continued)

Four states—Hawaii, Mississippi, Ohio and Vermont—have no discernible standards from either statutes or case law. Only twelve states, including New York, utilize the preponderance of evidence standard in termination proceedings.[19]

(footnote continued from preceding page)

222 (App. Ct., 4th Dist. 1979); *Iowa—Iowa Code Ann.*, §600A.8 (West Supp. 1980); *Kansas—In Interest of Kerns*, 225 Kan. 746, 594 P.2d 187 (1979); *Maine—Me. Rev. Stat. Ann.*, 22 §4055(1)(B)(2) (Baldwin Supp. 1980); *Michigan—Mich. Comp. Laws Ann.*, §722.25 (Supp. 1980); *Minnesota—Matter of Welfare of Rosenbloom*, 266 N.W.2d 888 (Minn. 1978); *Missouri—Mo. Ann. Stat.*, §211.447.2(2) (Vernon Supp. 1980); *Montana—Matter of J.L.B.*, 594 P.2d 1127 (Mont. 1979); *Nebraska—In Interest of Souza*, 204 Neb. 503, 283 N.W.2d 48 (1979); *Nevada—Sernaker v. Ehrlich*, 88 Nev. 277, 468 P.2d 5 (1970); *New Jersey—J. v. M.*, 157 N.J. Super. 478, 385 A.2d 240 (Super. Ct. App. Div. 1978); *New Mexico—N.M. Stat. Ann.* §40-7-4(J) (Supp. 1980); *North Carolina—N.C. Gen. Stat.* §7A-289.30(e) (Supp. 1979); *North Dakota—In Interest of J.A.*, 283 N.W.2d 83 (N.D. 1979); *Oklahoma—Matter of Darren Todd H.*, 615 P.2d 287 (Okla. 1980); *Pennsylvania—In re William L.*, 477 Pa. 322, 383 A.2d 1228 (1978), *cert. denied*, 439 U.S. 880 (1979); *Rhode Island—R.I. Gen. Laws* §15-7-7 (Supp. 1980); *Tennessee—Tenn. Code Ann.* §37-246(d) (Supp. 1980); *Texas—In re G.M.*, 596 S.W.2d 846 (Tex. 1980); *Utah—In Interest of Pitts*, 535 P.2d 1244 (Utah 1978); *Virginia—Va. Code* §16.1-283(B) (Supp. 1980); *Washington—In re Sego*, 82 Wash. 2 736, 513 P.2d 831 (1973); *Wisconsin—Wis. Stat. Ann.* §48.31(1) (West Supp. 1980); *Wyoming—In re X., Y. & Z.*, 607 P.2d 911 (Wyo. 1980).

[19]*Arizona—Ariz. Rev. Stat. Ann.* §8-537.B (1980); *Colorado—In Interest of M.B.*, 199 Colo. 370, 535 P.2d 192 (1975); *Connecticut—State of Conn. v. Anonymous*, 41 Conn. L.J., No. 12, p. 1 (Sept. 18, 1979); *Delaware—Matter of Five Minor Children*, 407 A.2d 198 (Del. 1979), *app. dism. Doe v. Delaware*, ___ U.S. ___, 49 U.S.L.W. 4250 (1981); *Idaho—Idaho Code* §16-2009 (1979); *Indiana—Ind. Code Ann.* §31-6-7-13(a) (Burns 1980); *Kentucky—Ky. Stat. Ann.* §199.603(1) (Supp. 1980); *Maryland—Coffey v. Dep't of Social Services*, 41 Md. App. 340, 397 A.2d 233 (Ct. Spec. App. 1979); *Massachusetts—Matter of Custody of a Minor*, 393 N.E.2d 379 (Mass., 1979); *New York—N.Y. Fam. Ct. Act* §622 (McKinney 1976); *Oregon—Or. Rev. Stat.* §419.525(2) (1979); *South Carolina—Children's Bureau of S.C. v. Johnson*, 269 S.C. 453, 237 S.E.2d 393 (1977).

CONCLUSION

For the above-stated reasons, petitioners pray that the judgement and order of the Supreme Court of the State of New York, Appellate Division, Third Department be reversed.

Respectfully submitted,

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APPENDIX A

Relevant Provisions of the New York Family Court Act

§611. Permanently neglected child; purpose of part.

The purpose of this part is to provide the procedures for proceedings initiated in family court, pursuant to section three hundred eighty-four-b of the social services law, for the commitment of the guardianship and custody of a child upon the ground that the child is a permanently neglected child. As used in this part "permanently neglected child" shall mean permanently neglected child as defined in subdivision seven of section three hundred eighty-four-b of the social services law, and unless the context requires otherwise, the provisions of such section three hundred eighty-four-b shall be deemed applicable requirements in addition to the procedures contained in this part. All references in this part to petitions and proceedings initiated "under this part": shall be deemed references to petitions and proceedings initiated under section three hundred eighty-four-b of the social services law upon the ground that the child is a permanently neglected child.

§614. Originating proceeding for the commitment of the guardianship and custody of a permanently neglected child.[1]

1. A proceeding for the commitment of the guardianship and custody of a child is originated by a petition, alleging:

(a) the child is a person under eighteen years of age;

(b) the child is in the care of an authorized agency;

(c) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be detrimental to the moral and temporal welfare of the child and specifying the reasons therefor;

(d) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so; and

(e) the best interests of the child require that the guardianship and custody of the child be committed to an authorized agency or to a foster parent authorized to originate this proceeding under section three hundred ninety-two of the social services law or section one thousand fifty-five of this act.

2. Where the petitioner is not the authorized agency, allegations relating to the efforts of the authorized agency may be made upon information and belief.

§622. Definition of "fact-finding hearing."

When used in this part, "fact-finding hearing" means in the case of a petition for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of subdivision one of section six hundred fourteen are supported by a fair preponderance of the evidence.

§623. Definition of "dispositional hearing."

When used in this part, "dispositional hearing" means a hearing to determine what order of disposition should be made in accordance with the best interests of the child.

§624. Evidence.

Only competent, material and relevant evidence may be admitted in a fact-finding hearing; only material and relevant evidence may be admitted in a dispositional hearing. Evidence of parental contact or of failure to maintain contact with a child subsequent to the date of the filing of a petition under this part shall be inadmissible in the fact-finding hearing. Such evidence may be admitted in the dispositional hearing but shall not, of itself, be sufficient as a matter of law to preclude or require an order committing the guardianship and custody of the child.

§625. Sequence of hearings.

(a) Upon completion of the fact-finding hearing, the dispositional hearing may commence immediately after the required findings are made, provided, however, that if all parties consent the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing.

(b) Reports prepared by the probation service or a duly authorized agency for use by the court prior to the making of an order of disposition shall be deemed confidential information furnished to the court which the court in a proper case may, in its discretion, withhold from or disclose in whole or

in part to the law guardian, counsel, party in interest, or other appropriate person. Such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing or in the making of an order of disposition without a dispositional hearing pursuant to subdivision (a) of this section.

§626. Adjournments.

(a) The court may adjourn a fact-finding hearing or a dispositional hearing for good cause shown on its own motion or on motion made on bhalf of the child, or on motion of the parent or other person responsible for the care of the child.

(b) At the conclusion of a fact-finding hearing and after it has made findings required before a dispositional hearing may commence, the court may adjourn the proceedings to enable it to make inquiry into the surroundings, conditions, and capacities of the persons involved in the proceedings.

§631. Disposition on adjudication of permanent neglect.

At the conclusion of a dispositional hearing on a petition for the commitment of the guardianship and custody of a child, the court shall enter an order of disposition:

(a) dismissing the petition in accord with section six hundred thirty-two; or

(b) suspending judgment in accord with section six hundred thirty-three; or

(c) committing the guardianship and custody of the child in accord with section six hundred thirty-four.

An order of disposition shall be made, pursuant to this section, solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition.

§632. Order dismissing petition.

(a) If the allegations of a petition under this part are not established, the court shall dismiss the petition.

(b) If a motion has been made in the course of a proceeding under this part to reconsider an underlying order of placement or commitment, the court retains jurisdiction to dispose of that motion regardless of whether it dismisses the petition.

§633. Suspended judgment.

(a) Rules of court shall define permissible terms and conditions of a suspended judgment. These terms and conditions shall relate to the acts or omissions of the parent or other person responsible for the care of the child.

(b) The maximum duration of a suspended judgment under this section is one year, unless the court finds at the conclsion of that period that exceptional circumstances require an extension of that period for an additional year.

§634. Commitment of guardianship and custody; further orders.

The court may enter an order under section six hundred thirty-one committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper.

Relevant Provisions of the New York Social Services Law

§384-b. Guardianship and custody of destitute or dependent children; commitment by court order.

1. Statement of legislative findings and intent.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects

on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

2. For the purposes of this section, "child" shall mean a person under the age of eighteen years.

3. (a) The guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency, or to a foster parent authorized pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act to institute a proceeding under this section, by order of a surrogate or judge of the family court, as hereinafter provided. Where such guardianship and custody is committed to a foster parent, the family court or surrogate's court shall retain continuing jurisdiction over the parties and the child and may, upon its own motion or the motion of any party, revoke, modify or extend its order, if the foster parent fails to institute a proceeding for the adoption of the child within six months after the entry of the order committing the guardianship and custody of the child to such foster parent. Where the foster parent institutes a proceeding for the adoption of the child and the adoption petition is finally denied or dismissed, the court which committed the guardianship and custody of the child to the foster parent shall revoke the order of commitment. Where the court

revokes an order committing the guardianship and custody of a child to a foster parent, it shall commit the guardianship and custody of the child to an authorized agency.

(b) A proceeding under this section may be originated by an authorized agency or by a foster parent authorized to do so pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act.

(c) Proceedings under this section shall be originated in the county in which the authorized agency has an office for the regular conduct of business or in which the child or his parent resides at the time of the initiation of the proceeding.

(d) The family court shall have exclusive, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (c) or (d) of subdivision four of this section, and the family court and surrogate's court shall have concurrent, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (a) or (b) of subdivision four.

(e) A proceeding under this section is originated by a petition on notice served upon the child's parent or parents and upon such other persons as the surrogate or judge may in his discretion prescribe. Such notice shall inform the parents and such other persons that the proceeding may result in an order freeing the child for adoption without the consent of or notice to the parents or such other persons. Such notice also shall inform the parents and such other persons of their right to the assistance of counsel, including any right they may have to have counsel assigned by the court in any case where they are financially unable to obtain counsel. The petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section and section three hundred eighty-

four-c, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice pursuant to the provisions of this section or of section three hundred eighty-four-c. When the proceeding is initiated in family court service of the petition and other process shall be made in accordance with the provisions of section six hundred seventeen of the family court act, and when the proceeding is initiated in surrogate's court, service shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act.

(f) In any proceeding under this section in which the surrogate's court has exercised jurisdiction, the provisions of the surrogate's court procedure act shall apply to the extent that they do not conflict with the specific provisions of this section. In any proceeding under this section in which the family court has exercised jurisdiction, the provisions of articles one, two and eleven of the family court act shall apply to the extent that they do not conflict with the specific provisions of this section. Any proceeding originated in family court upon the ground specified in paragraph (d) of subdivision four of this section shall be conducted in accordance with the provisions of part one of article six of the family court act.

(g) An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon a finding that one or more of the grounds specified in paragraphs (a), (b) or (d) or subdivision four are based upon a fair preponderance of the evidence, or upon a finding that one or more of the grounds specified in paragraph (c) of subdivision four are based upon clear and convincing proof.

(h) In any proceeding brought upon a ground set forth in paragraph (c) of subdivision four, neither the privilege

attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege; as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

(i) In a proceeding instituted by an authorized agency pursuant to the provisions of this section, proof of the likelihood that the child will be placed for adoption shall not be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency.

(j) The order and the papers upon which it was granted in a proceeding under this section shall be filed in the court, and a certified copy of such order shall also be filed in the office of the county clerk of the county in which such court is located, there to be recorded and to be inspected or examined in the same manner as a surrender instrument, pursuant to the provisions of section three hundred eighty-four of this chapter.

(k) Where the child is over fourteen years of age, the court may, in its discretion, consider the wishes of the child in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child.

4. An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one

or more of the following grounds:

(a) Both parents of the child are deasd, and no guardian of the person of such child has been lawfully appointed; or

(b) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, abandoned such child for the period of six months immediately prior to the initiation of the proceeding under this section; or

(c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the proceeding under this section; or

(d) the child is a permanently neglected child.

5. (a) For the purposes of this section, a child is "abandoned" by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. In making such determination, the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of this subdivision.

. (a) For the purposes of this section, "mental illness" means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgement to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(b) For the purposes of this section, "mental retardation" means subadverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(c) The legal sufficiency of the proof in a proceeding upon the ground set forth in paragraph (c) of subdivision four of this section shall not be determined until the judge has taken the testimony of a physician and psychologist, or psychiatrist, in accordance with paragraph (e) of this subdivision.

(d) A determination or order upon a ground set forth in paragraph (c) of subdivision four shall in no way affect any other right, or constitute an adjudication of the legal status of the parent.

(e) In every proceeding upon a ground set forth in paragraph (c) of subdivision four the judge shall order the parent to be examined by, and shall take the testimony of, a physician and a certified psychologist, in the case of a parent alleged to be mentally retarded, or of a psychiatrist, in the case of a parent alleged to be mentally ill, such physician, psychologist or psychiatrist to be appointed by the court pursuant to section thirty-five of the judiciary law. The parent and the authorized agency shall have the right to

submit other psychiatric, psychological or medical evidence. If the parent refuses to submit to such court-ordered examination, or if the parent renders himself unavailable therefor whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed physician, psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion.

7. (a) For the purposes of this section, "permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such hild is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

(c) As used in paragraph (a) of this subdivision, "to plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

(f) As used in this subdivision, "diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between

the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child;

(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

(4) informing the parents at appropriate intervals of the child's progress, development and health.

8. Nothing in this section shall be construed to terminate, upon commitment of the guardianship and custody of a child to an authorized agency or foster parent, any rights and benefits, including but not limited to rights relating to inheritance, succession, social security, insurance and wrongful death action claims, possessed by or available to the child pursuant to any other provision of law.